APPENDIX

APPENDIX

ATTACHMENT A

Section 165 Internal Revenue Code

SEC. 165 [As amended by Section 162(a) of the Revenue Act of 1942, *supra*]. EMPLOYEES' TRUSTS.

(a) *Exemption from Tax.*—A trust forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall not be taxable under this supplement and no other provisions of this supplement shall apply with respect to such trust or to its beneficiary—

(1) if contributions are made to the trust by such employer, or employees, or both, for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan;

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries;

* * * * * *

ATTACHMENT B

Section 29.23 (p)-(1) Internal Revenue Code

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Section 121(a) of the Revenue Act of 1942, c. 619, 56 Stat 798] *Expenses.*—

(1) *Trade or Business Expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *

* * * * * *

(p) [As amended by Section 162(b) of the Revenue Act of 1942, *supra*] *Contributions of an Employer to an Employees' Trust or Annuity Plan and Compensation Under a Deferred-Payment Plan.*—

(1) *General Rule.*—If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation shall not be deductible under subsection (a) but shall be deductible, if deductible under subsection (a) without regard to this subsection, under this subsection but only to the following extent:

(A) In the taxable year when paid, if the contributions are paid into a pension trust, and if such taxable year ends within or with a taxable year of the trust for which the trust is exempt under section 165(a), * * *

* * * * * *

(D) In the taxable year when paid, if the plan is not one included in paragraphs (A), (B), or (C), if the employees' rights to or derived from such employer's contribution or such compensation are nonforfeitable at the time the contribution or compensation is paid.

ATTACHMENT C

Treasury Regulations 111: Sec. 29.23 (p)-(1), (11)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23(p)-1. CONTRIBUTIONS OF AN EMPLOYER TO AN EMPLOYEES' TRUST OR ANNUITY PLAN AND COMPENSATION UNDER A DEFERRED PAYMENT PLAN.—*In General.*—Section 23(p) prescribes limitations upon deductions for amounts contributed by an employer under a pension, annuity, stock bonus, or profit-sharing plan, or under any plan of deferred compensation. It is immaterial whether the plan covers present employees only, or present and former employees, or only former employees. Section 23(p) does not cover contributions or compensation which give the employee or former employee present benefits such as life insurance protection. The cost of such benefits is deductible to the extent allowable under section 23(a). See section 29.165-6. Section 23(p), however, is applicable to all contributions under a stock bonus, pension, profit-sharing, or annuity plan, whether or not the employee's rights in such contributions are nonforfeitable.

A contribution to be deductible under section 23(p) must be an ordinary and necessary expense which would be deductible under section 23(a) if it were not for the fact that the statute specifically provides that it shall be deductible under section 23(p). A contribution by a corporation under a plan which is created primarily for the purpose of benefiting shareholders of the company is not deductible. Such contribution may constitute a dividend within the meaning of section 115(a). A contribution under a plan that is set up for the exclusive benefit of employees as such, and thus represents an item of expense, is of the nature of compensation for personal services rendered by the employees covered by the plan. The amount of contributions allowable as a deduction has an over-all limitation—the entire contributions for the taxable year when added to other compensation paid must represent reasonable compensation for services rendered by the employee beneficiaries. In the case of contributions for pensions for employees, any contributions on behalf of an employee in

excess of the amount necessary to provide a reasonable pension for the employee in view of his past and current services is not deductible. What constitutes a reasonable pension will depend upon the facts in the particular case. Compensation otherwise paid the employee, length of service, and retirement age are among the elements to be considered in determining what is a reasonable pension. In the case of a stock bonus or profit-sharing plan which provides for additional compensation for employees not paid as a pension, a contribution will not be fully deductible unless it can be justified as a reasonable addition to the compensation otherwise paid to employees who are beneficiaries under the plan. In addition to the over-all limitation referred to above, section 23(p) sets forth further limitations as to the amounts that may be deductible for the taxable year.

Section 23(p) is not confined to formal stock bonus, pension, profit-sharing, and annuity plans, or deferred compensation plans, but it includes any method of contributions or compensation having the effect of a stock bonus, pension, profit-sharing, or annuity plan, or similar plan deferring the receipt of compensation. Thus, a corporation paying pensions to such of its retired employees and in such amounts as may be determined from time to time by the board of directors or responsible officers of the company has a plan in effect that is governed by section 23(p). If an employer on the accrual basis defers paying any compensation to an employee until a later year or years under an arrangement having the effect of a stock bonus, pension, profit-sharing, or annuity plan, or similar plan deferring the receipt of compensation, he shall not be allowed a deduction until the year in which the compensation is paid. This provision is not intended to cover the case where an employer on the accrual basis defers payment of compensation after the year of accrual merely because of inability to pay such compensation in the year of accrual, as, for example, where the funds of the company are not sufficient to enable payment of the compensation without jeopardizing the solvency of the company, or where the liability accrues in the earlier year, but the amount payable cannot be exactly determined until the later year.

Deductions under section 23(p) are generally allowable only for the year for which the contribution or compensation is paid, regardless of the fact that the taxpayer may make his return on the accrual basis. Exceptions are made in the case of overpayments as provided in sub-paragraphs (A), (C), and (F) of section 23(p)(1), and, as provided by section 23(p)(1)(E), in the case of payments made by a taxpayer on the accrual basis within 60 days after the close of the taxable year of accrual. This latter provision is intended to permit a taxpayer on the accrual basis to deduct such accrued contribution or compensation, provided payment is actually made within 60 days after the close of the year of accrual.

Any payments shall be disallowed as a deduction under section 23(p), if determined by the National War Labor Board, the Secretary of Agriculture, or the Commissioner to have been made in contravention of the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes," as amended (Public Law 729, Seventy-seventh Congress; Public Law 34, Seventy-eighth Congress), or of the regulations, orders, or rulings promulgated thereunder.

SEC. 29.23(p)-11. CONTRIBUTIONS OF AN EMPLOYER UNDER A PLAN THAT DOES NOT MEET THE REQUIREMENTS OF SECTION 165(a) (SECTION 23(p)(1)(D)).—Subparagraph (D) of section 23(p)(1) covers all cases for which deductions are allowable under section 23(p)(1) but not allowable under subparagraphs (A), (B), (C), or (F) of such section. No deduction is allowable under section 23(p)(1)(D) for any contribution paid or accrued by an employer under a stock bonus, pension, profit-sharing, or annuity plan, or for any compensation paid or accrued on account of any employee under a plan deferring the receipt of such compensation, except for the year when paid, and then only to the extent allowable under section 23(p)(1). See section 29.23(p)-1. If payments are made under such a plan and the amounts are not deductible under the other subparagraphs of section 23(p)(1), they are deductible under subparagraph (D) to the extent that individual employees' rights to or derived from such employer's contribution or such compensation

are nonforfeitable at the time the contribution or compensation is paid. As to what constitutes nonforfeitable rights of an employee, see section 29.165-7. If an amount is accrued but not paid during the taxable year, or if paid during the taxable year and the employees' rights are forfeitable at the time the amount is paid, no deduction will be allowed the employer for such amount for such taxable year.

ATTACHMENT D

Opinion of the U. S. Court of Appeals

No. 11626

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACOB LICHTER, JENNIE L. LICHTER,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION TO REVIEW THE DECISION
OF THE TAX COURT OF THE UNITED STATES

(Filed Dec. 19, 1952)

Decided December 19, 1952.

Before SIMONS, Chief Judge, MARTIN and MILLER, Circuit Judges.

PER CURIAM. This petition for review of a decision of the Tax Court of the United States has been heard and considered on the record and on the briefs and oral arguments of the attorneys.

The petition avers that the Tax Court erred in holding that contributions made to a trust created by an instrument executed by a *bona fide* husband and wife partnership are not deductible on the income tax return of the petitioners, doing business as Southern Fireproofing Company, for the taxable years 1942 and 1943.

The findings of fact of the Tax Court are supported by substantial evidence and are accepted here as the facts of the case.

Under the pertinent provisions of the trust instrument, the duties, acts and powers of the Trustee were limited to the instructions given by an Advisory Board consisting of three members appointed by the petitioners to hold office as such until their successors are designated in writing, unless terminated earlier by death or resignation.

The trust instrument provided that the property and assets of the trust should not revert to the employer, but that the employer should have the right to amend or modify the trust agreement by instruments in writing directed to the Trustee, whose duties, powers, and liabilities should not be substantially changed or increased without the Trustee's written consent.

The instrument provided further that should the employer be judicially declared bankrupt or insolvent, or in the event of "dissolution, merger or consolidation," without provision for the continuance of the trust, the trust property should be distributed or disposed of in accordance with the instructions of the Advisory Board and, after such distribution, the trust should be terminated.

As stated by the Tax Court, the Advisory Board possessed full control over the disposition, allotment, investment or distribution of the trust assets, as well as authority to direct a change in beneficiary. The Trustee was empowered to purchase annuity or life insurance policies on such individuals or groups of individuals as the Advisory Board might direct. The Trustee was granted the right to change a beneficiary to a person, or persons, having an insurable interest in the insured life.

We agree with the Tax Court that, with respect to payments made in 1942, the trust was not for the exclusive benefit of the employees or their beneficiaries within the meaning of section 165(a)(2) of the Internal Revenue Code, and such payments were accordingly not deductible under section 23(p)(1)(A) of the Code.

We also agree with the conclusion of the Tax Court that the contributions made to the trust in 1942 and 1943 were not non-forfeitable within the meaning of section 23(p)(1)(D) of the Internal Revenue Code.

We reason with the Tax Court, too, that no enforceable beneficial interest is granted to any person by the trust instrument, for the trust assets could be disposed of or distributed in any manner chosen by the Advisory Board in its discretionary power.

In our judgment, the Tax Court correctly held that the deductions claimed by the taxpayers are not allowable; and, therefore, its decision is affirmed.

ATTACHMENT E

Order of the Ohio Court of Appeals

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
(Entered February 25, 1953)

C. W. STEINKAMP, SR., Administrator of the Estate of Herbert L. Pullen, Deceased; MARY LOUISE PULLEN, Widow of Herbert L. Pullen, Deceased, and Sole Beneficiary of His Estate,

Appellees,

v.

THE CENTRAL TRUST COMPANY, an Ohio Corporation; JACOB LICHTER and JENNIE L. LICHTER, Individually and as Partners Doing Business as Southern Fireproofing Company, a Partnership; MRS. O. H. UTZ, Individually and as Chairman of the Advisory Board of the Bonus and Profit Sharing Plan of Southern Fireproofing Company, a Partnership,

Appellants.

No. 7521

DECREE

Enter, MATTHEWS, P. J.

This appeal came on to be heard on the evidence as contained in the Stipulation of Facts, the briefs and statements of counsel, and the Court finds that the issues hereof, wherein plaintiffs (whose rights are derivative of Herbert L. Pullen, deceased, a former employee of Jacob Lichter and Jennie L. Lichter, as partners of Southern Fireproofing Company), seek to require The Central Trust Company, as Trustee of the Bonus and Profit-Sharing Plan of said Southern Fireproofing Company, to deliver to them bonds of the said Herbert L. Pullen held by it as such Trustee, should be determined in favor of plaintiffs, and that The Central Trust Company, as such Trustee, should deliver the bonds held by it in the name of and for the account of Herbert L. Pullen, to plaintiffs, as prayed for in said petition.

The Court further finds, for the reasons stated by the trial court in its opinion that the Bonus and Profit-Sharing Plan of said Southern Fireproofing Company, and the Trust Agreement thereof, are valid, and that defendants Jacob Lichter and Jennie L. Lichter, doing business as Southern Fireproofing Company as aforesaid, are bound by Section IX of said Trust Agreement, and accordingly that the bonds may not revert to them.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

(1) That defendant The Central Trust Company, Trustee, deliver said United States Savings Bonds, Series F, numbered V 115365 F, M 449487 F and C 546218 F to the Treasurer of the United States or his fiscal agent for re-issue in the name of plaintiff C. W. Steinkamp, Sr., Administrator of the Estate of Herbert L. Pullen, deceased.

(2) That upon receipt from the Treasurer of the United States or his fiscal agent of re-issued bonds in the name of plaintiff, C. W. Steinkamp, Sr., Administrator of the Estate of Herbert L. Pullen, deceased, the defendant The Central Trust Company, Trustee, deliver forthwith said re-issued bonds to plaintiff C. W. Steinkamp, Sr., Administrator of the Estate of Herbert L. Pullen, deceased.

(3) That all of the costs of this proceeding be paid by the defendants.

IT IS FURTHER ORDERED, that a mandate issue herefrom to carry this judgment into effect.

Have seen and approve:

DINSMORE, SHOHL, SAWYER & DINSMORE,

Attorneys for Appellees,

STEER, STRAUSS & ADAIR,
PAUL W. STEER,

Attorneys for Appellants.

CLERK'S CERTIFICATE

THE STATE OF OHIO, }
HAMILTON COUNTY } ss

I, Elmer F. Hunsicker, Clerk of the Court of Appeals of Hamilton County, Ohio, do hereby certify that the within and foregoing is a true and correct Transcript of the Decree Finding for Plaintiff (Entered Feb. 25, 1953, Minute 23) in Case No. 7521, wherein C. W. Steinkamp, Sr., Administrator and etc., et al., were Appellees and The Central Trust Company, an Ohio corporation, et al., were Appellants, as appears from the files and records now in my office.

IN TESTIMONY WHEREOF, I, the Clerk aforesaid, have hereunto set my hand, and affixed the Seal of the said Court, at Cincinnati, in said county, this 26th day of February A. D. 1953.

/s/ ELMER F. HUNSICKER,
Clerk Court of Appeals of Hamilton County, Ohio.

[SEAL]

STATE OF OHIO }
HAMILTON COUNTY } ss

I, Stanley Matthews, Presiding Judge of the Court of Appeals of Hamilton County, Ohio, the same being a Court of Law and Record in and for the County of Hamilton do hereby certify that Elmer F. Hunsicker is Clerk of said Court, and was such Clerk at the time of making, and subscribing to, the foregoing Certificate and that the attestation of said Clerk is in due form of law, and by the proper officer.

IN TESTIMONY WHEREOF, I do hereby subscribe my name, at Cincinnati, this 26th day of February A. D. 1953.

/s/ STANLEY MATTHEWS,
Presiding Judge of the Court of Appeals of Hamilton County, Ohio.

THE STATE OF OHIO, }
HAMILTON COUNTY } ss

I, Elmer F. Hunsicker, Clerk of the Court of Appeals of Hamilton County, Ohio, do hereby certify that Stanley Matthews whose name is subscribed to the foregoing certificate, was at the time of subscribing the same Presiding Judge of the Court of Appeals of Hamilton County, Ohio, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

IN TESTIMONY WHEREOF, I, the Clerk aforesaid, have hereunto set my hand, and affixed the Seal of the said Court, at Cincinnati, in said county, this 26th day of February A. D. 1953.

/s/ ELMER F. HUNSICKER,
Clerk Court of Appeals of Hamilton County, Ohio.

[SEAL]

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 665

JACOB LICHTER AND JENNIE L. LICHTER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 106-110) is reported at 17 T.C. 1111. The opinion of the Court of Appeals (R. 132-134) is reported at 201 F. 2d 49.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1952. (R. 131.) The petition for a writ of certiorari was filed on March 17, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether certain payments made by the Southern Fireproofing Company, a partnership composed of taxpayers herein, into its bonus and profit sharing plan for the benefit of certain of its employees, are deductible on its and taxpayers' income tax returns for 1942 and 1943 under Section 165(a) and Section 23(p)(1)(A) and (D) of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are printed in the Appendix, *infra*, pp. 8-15.

STATEMENT

In 1941, the Southern Fireproofing Company, a partnership, composed of the taxpayers herein, initiated a bonus and profit-sharing plan for certain of its employees by means of a trust agreement executed between them, as partners in that company, and the Central Trust Company of Cincinnati, Ohio, as trustee. (R. 102.) Taxpayers made an initial deposit of $9,000 in the trust fund (R. 102-103), and subsequently in 1942 and 1943, respectively, made contributions thereto of $8,200 and $12,000 to be used for the benefit of certain named employees. One employee, Herbert L. Pullen, had been employed under a contract calling for the payment of a bonus to him each year in addition to the annual salary for which he contracted. Pursuant to the provisions of the agreement, the amount of bonus called for in 1942 was $6,000. The wage stabilization unit of the Bureau of Internal Revenue disallowed payment of any amount in

excess of $1,500. Thereupon $1,500 was paid directly to Pullen and bonds with a face value of $6,000 costing $4,514 were deposited to his credit in the bonus and profit-sharing plan. This payment to his account was made on April 9, 1943. Upon his death, in 1945, his estate made demand for the payment of Pullen's share in the plan. This demand was refused and suit was brought to compel payment thereof. That action was pending at the time of the Tax Court's decision. (R. 105-106.) Subsequently, the Ohio Court of Appeals, after trial of that action, ordered the bonds delivered to the administrator of Pullen's estate. (Pet. App. 9a-10a.) Taxpayers have filed a petition for certiorari, now pending, to the Supreme Court of Ohio in which they seek a review and reversal of the decision of the Ohio Court of Appeals. (Pet. 6.)

Under the trust instrument involved, the duties, powers and acts of the trustee were limited to the directions and instructions of an advisory board, consisting of employees and retired employees of the Company who were appointed and subject to removal by the taxpayers. (R. 103.)

The trust instrument also provided that the trustee might purchase annuity or life insurance policies on such individuals or group of individuals as the advisory board might direct; that the trustee might exercise any of the rights and options guaranteed by such policies or contracts, including the right to change the beneficiary to a person or persons having an insurable interest in the life of the insured, upon written direction from the advisory

board requesting such change; and that in the event that the partnership was declared bankrupt or insolvent, or in the event of dissolution, merger or consolidation without provisions being made for the continuance of the trust, the trust property was to be distributed or disposed of in accordance with the instructions of the advisory board, and the trust terminated. (R. 104.) It was further provided that notwithstanding anything in the trust agreement to the contrary, under no circumstances was any policy or the proceeds thereof, or any other property or assets of the trust, to revert to the partnership, and that the partnership was not to be entitled to exercise any rights or options in regard to the policies, property or assets, or derive any benefits therefrom (R. 104); subject to the foregoing restrictions, the partnership retained the right to amend or modify the provisions of the trust agreement. (R. 105.)

Taxpayers claimed the above-mentioned payments as deductions on their partnership returns for 1942 and 1943. (R. 78, 82.) The Commissioner of Internal Revenue disallowed these deductions as improper under Sections 23 and 165 of the Internal Revenue Code and asserted a deficiency against each taxpayer accordingly. (R. 16-17, 28-29.) The Tax Court sustained the Commissioner in his determinations (R. 107-110) and the Court of Appeals affirmed (R. 131).

ARGUMENT

The petition presents no question of any general importance warranting review by this Court.

The question presented involves the right to deductions under Sections 165(a) and 23(p)(1)(A) and (D) of the Internal Revenue Code (Appendix, *infra*, pp. 8-10) of contributions to a bonus and profit-sharing plan. As presented here, that question involves only the construction of a particular trust instrument. The decision of the court below is correct and is in accord with *Charles E. Smith & Sons Co.* v. *Commissioner,* 184 F. 2d 1011 (C.A. 6th), certiorari denied, 340 U. S. 953, motion for leave to file petition for rehearing denied, 341 U. S. 937; *Roberts Filter Mfg. Co.* v. *Commissioner,* 174 F. 2d 79 (C.A. 3d); *Robertson* v. *Steele's Mills,* 172 F. 2d 817 (C.A. 4th); and *South Texas Commercial National Bank of Houston* v. *Commissioner,* 7 T.C. 764, affirmed, 162 F. 2d 462 (C.A. 5th), certiorari denied, 332 U. S. 772. There is no conflict.

The conflict alleged is with a decision of an intermediate state court, which taxpayers are still litigating and in which it was held that the administrator of Pullen's estate was entitled to certain bonds which had been purchased by the trustee in the name of Pullen, a former employee, with funds representing excess salary, payment of which had been disallowed as being in violation of the provisions of the Stabilization Act of 1942.[1] It is not clear on what basis recovery of the bonds was sought in the state court. The decree of the Ohio state court was based upon stipulated facts (Pet.

[1] Act of October 2, 1942, c. 578, 56 Stat. 765, Section 1 (50 U.S.C. App. 1946 ed., Section 961).

App. 9a), not disclosed, and may not have consisted of the same facts, found by the Tax Court herein, on which the lower court based its judgment.

In any event, the decision of the state court with respect to the right of the administrator of Pullen's estate to the bonds can have no effect upon the question of deductibility of contributions to the bonus and profit-sharing plan established by the partnership. This is so because the funds used to purchase the bonds represented the portion of Pullen's salary which had been determined to be excessive under the Stabilization Act of 1942, *supra*.

Section 29.23(p)-1 of Treasury Regulations 111 (Appendix, *infra*, pp. 11-12), interpreting Section 23(p)(1) of the Code (Appendix, *infra*, p. 8), specifically provides that payments to a bonus and profit-sharing plan shall be disallowed as a deduction under Section 23(p) of the Code when determined to have been made in contravention of the Stabilization Act of 1942. Thus it is clear that under no circumstances can the decision of the Ohio state court, with respect to the right of the administrator of Pullen's estate to the bonds, determine the deductibility of that item. The item is clearly not deductible by the partnership under Section 23(p).

The petition for certiorari therefore presents no question of conflict of decisions, nor does it present any substantial grounds warranting review of the decision of the court below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
ALEXANDER F. PRESCOTT,
GEORGE F. LYNCH,
Special Assistants to the Attorney General.

APRIL, 1953.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Section 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. *Expenses.*—

(1) *Trade or Business Expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *

* * * * *

(p) [As amended by Section 162(b) of the Revenue Act of 1942, *supra*] *Contributions of an Employer to an Employees' Trust or Annuity Plan and Compensation Under a Deferred-Payment Plan.*—

(1) *General Rule.*—If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation shall not be deductible under subsection (a) but shall be deductible, if deductible under subsection (a) without regard to this subsection, under

this subsection but only to the following extent:

(A) In the taxable year when paid, if the contributions are paid into a pension trust, and if such taxable year ends within or with a taxable year of the trust for which the trust is exempt under section 165(a), * * *

* * * * *

(D) In the taxable year when paid, if the plan is not one included in paragraphs (A), (B), or (C), if the employees' rights to or derived from such employer's contribution or such compensation are nonforfeitable at the time the contribution or compensation is paid.

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

SEC. 165 [As amended by Section 162(a) of the Revenue Act of 1942, *supra*]. *Employees' Trusts.*

(a) *Exemption from Tax.*—A trust forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall not be taxable under this supplement and no other provision of this supplement shall apply with respect to such trust or to its beneficiary—

(1) if contributions are made to the trust by such employer, or employees, or both, for the purpose of distributing to such employees or their beneficiaries the corpus and

income of the fund accumulated by the trust in accordance with such plan;

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries;

* * * * *

(26 U.S.C. 1946 ed., Sec. 165.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 162. PENSION TRUSTS.

* * * * *

(d) *Taxable Years to Which Amendments Applicable.*—The amendments made by this section shall be applicable as to both the employer and employees only with respect to taxable years of the employer beginning after December 31, 1941, except that—

(1) In the case of a stock bonus, pension, profit-sharing, or annuity plan in effect on or before September 1, 1942,

(A) such a plan shall not become subject to the requirements of section 165(a)(3), (4), (5), and (6) until the beginning of the first taxable year beginning after December 31, 1942,

* * * * *

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23(p)-1. CONTRIBUTIONS OF AN EMPLOYER TO AN EMPLOYEES' TRUST OR ANNUITY PLAN AND COMPENSATION UNDER A DEFERRED PAYMENT PLAN—*In General.*—Section 23(p) prescribes limitations upon deductions for amounts contributed by an employer under a pension, annuity, stock bonus, or profit-sharing plan, or under any plan of deferred compensation. It is immaterial whether the plan covers present employees only, or present and former employees, or only former employees. Section 23(p) does not cover contributions or compensation which give the employee or former employee present benefits such as life insurance protection. The cost of such benefits is deductible to the extent allowable under section 23(a). See section 29.165-6. Section 23(p), however, is applicable to all contributions under a stock bonus, pension, profit-sharing, or annuity plan, whether or not the employee's rights in such contributions are nonforfeitable.

A contribution to be deductible under section 23(p) must be an ordinary and necessary expense which would be deductible under section 23(a) if it were not for the fact that the statute specifically provides that it shall be deductible under section 23(p). * * *

Section 23(p) is not confined to formal stock bonus, pension, profit-sharing, and annuity plans, or deferred compensation plans, but it includes any method of contributions or compensation having the effect of a stock bonus,

pension, profit-sharing, or annuity plan, or similar plan deferring the receipt of compensation. * * *

Deductions under section 23(p) are generally allowable only for the year for which the contribution or compensation is paid, regardless of the fact that the taxpayer may make his return on the accrual basis. * * *

Any payments shall be disallowed as a deduction under section 23(p), if determined by the National War Labor Board, the Secretary of Agriculture, or the Commissioner to have been made in contravention of the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes," as amended (Public Law 729, Seventy-seventh Congress; Public Law 34, Seventy-eighth Congress), or of the regulations, orders, or rulings promulgated thereunder.

SEC. 29.23(p)-11. CONTRIBUTIONS OF AN EMPLOYER UNDER A PLAN THAT DOES NOT MEET THE REQUIREMENTS OF SECTION 165(a) (SECTION 23(p) (1)(D)).—Subparagraph (D) of section 23(p)(1) covers all cases for which deductions are allowable under section 23(p) (1) but not allowable under subparagraphs (A), (B), (C), or (F) of such section. No deduction is allowable under section 23(p)(1) (D) for any contribution paid or accrued by an employer under a stock bonus, pension, profit-sharing, or annuity plan, or for any compensation paid or accrued on account of any employee under a plan deferring the receipt of such compensation, except for the year when

paid, and then only to the extent allowable under section 23(p)(1). See section 29.23 (p)-1. If payments are made under such a plan and the amounts are not deductible under the other subparagraphs of section 23(p)(1), they are deductible under subparagraph (D) to the extent that individual employees' rights to or derived from such employer's contribution or such compensation are nonforfeitable at the time the contribution or compensation is paid. As to what constitutes nonforfeitable rights of an employee, see section 29.165-7. If an amount is accrued but not paid during the taxable year, or if paid during the taxable year and the employees' rights are forfeitable at the time the amount is paid, no deduction will be allowed the employer for such amount for such taxable year.

SEC. 29.165-1. EMPLOYEES' TRUSTS.—*(a) In general.*—In order that a trust may be exempt under section 165(a) it must be part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries. The trust must be formed and availed of solely to aid in the proper execution of a plan which is a definite written program and arrangement communicated to the employees, solely designed and applied to enable such employees or their beneficiaries to share in the capital or profits of such employer's trade or business or to provide for the livelihood of such employees or their beneficiaries after the retirement of such employees.

The term "plan" implies a permanent as distinguished from a temporary program. * * *

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SEC. 29.165-2. IMPOSSIBILITY OF DIVERSION UNDER THE TRUST INSTRUMENT.—*(a) In general.*—Under section 165(a) (2) a trust is not exempt unless under the trust instrument it is impossible (in the taxable year and at any time thereafter prior to the satisfaction of all liabilities to employees or their beneficiaries covered by the trust) for any part of the trust corpus or income to be used for, or diverted to, purposes other than for the exclusive benefit of such employees or their beneficiaries. As used in section 165(a)(2), the phrase "if under the trust instrument it is impossible" means that the trust instrument must definitely and affirmatively make it impossible for the nonexempt diversion or use to occur, whether by operation or natural termination of the trust, by power of revocation or amendment, by the happening of a contingency, by collateral arrangement, or by any other means. It is not essential that the employer relinquish all power to modify or terminate the rights of certain employees covered by the trust, but it must be impossible for the trust funds to be used or diverted for purposes other than for the exclusive benefit of his employees or their beneficiaries. As used in section 165(a)(2), the phrase "purposes other than for the exclusive benefit of his employees or their beneficiaries" includes all objects or aims not solely designed for the proper satisfaction of all liabilities to

employees or their beneficiaries covered by the trust.

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SEC. 29.165-7. TREATMENT OF BENEFICIARY OF A TRUST NOT EXEMPT UNDER SECTION 165 (a).—Any contribution made by an employer on behalf of an employee to a trust during a taxable year of the employer which ends within or with a taxable year of the trust for which the trust is not exempt under section 165(a), shall be included in income of the employee for his taxable year during which the contribution is made if the employee's beneficial interest in the contribution is nonforfeitable at the time the contribution is made. An employee's beneficial interest in the contribution is nonforfeitable within the meaning of sections 165(c) and 23(p)(1)(D) at the time the contribution is made if there is no contingency under the plan which may cause the employee to lose his rights in the contribution.
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